

Safety Policy, Drugs, Alcohol and Other Penalties in Missouri Workers' Compensation



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Penalties



1. Hardship Hearing/Unreasonable
2. Employer Penalties
3. Drug/Alcohol (Employee penalty)
4. Safety Violations(Employee penalty)



Penalties for Both Employer and Employee

Hardship Trials (RSMo 287.203) and (RSMo 287.560)

ALJ has discretion to award costs and fees

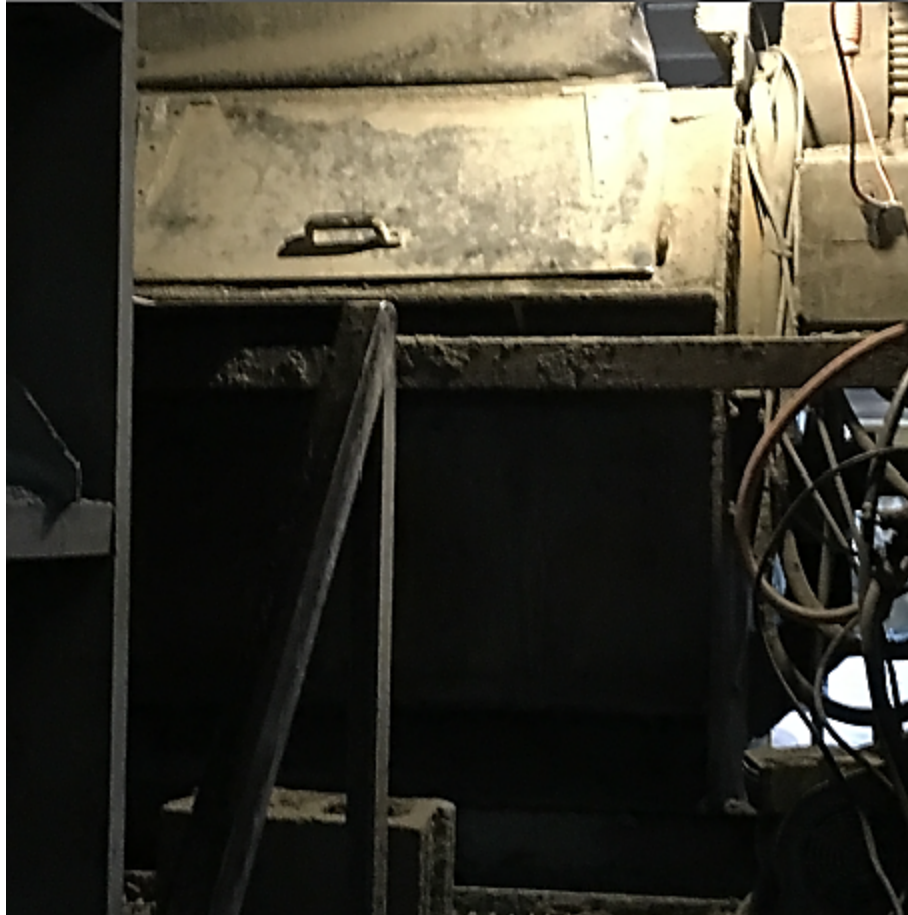
Unreasonable prosecution/defense of case (RSMo 287.560)

Rarely used in practice unless prosecution/defense egregious

Use for repetitive trauma cases against employer/carrier that denies coverage

Use for contractor vs. subcontractor cases when defending the case and pursuing another contractor.











Employer Penalties

- Failure of Employer to follow lawful order of the Division/Commission (287.120.4)
- Failure of Employer to comply with ANY state statute
- 15% increase in compensation/death benefits



Employee Penalties

Drugs/Alcohol

- 1. Partial Defense
(287.120.6(1))
- 2. Complete Defense:
(287.120.6(2))

Safety Violations

- 1. Safety Policy
(287.120.5)
- 2. Safety Devices
(287.120.5)



Drugs and Alcohol

Controlled Substances and Alcohol

- 50% reduction of all compensation (medical, TTD, PPD)
- Accident in conjunction with positive drug test(*Kelso/Nolan*)



Drug and Alcohol Defenses

Forfeiture of all benefits occurs when:

1. Use alcohol/drugs in violation of employer's rule or policy.
(No posting required.)
2. Proximate cause of the injury.
 - Rebuttable presumption that being under the influence was the proximate cause of the injury when under Missouri law the drug test constitutes legal intoxication. (0.08%).
 - Employee's refusal to take drug test at employer's request results in forfeiture of benefits if (1) employer had sufficient cause to suspect use of drugs by claimant or (2) if employer's policy authorized post injury testing.



Proposed Statutory Changes

Senate Bill No. 66

- §287.120.6 (4): Any positive test result for a nonprescribed controlled drug or metabolites of such drug from an employee shall give rise to a rebuttable presumption, which may be rebutted by a preponderance of evidence, that the tested nonprescribed controller drug was in the employee's system at the time of the accident or injury and that the injury was sustained in conjunction with the use of the tested nonprescribed controlled drug if:
 - (a) The initial testing was administered within twenty-four hours of the accident or injury;
 - (b) Notice was given to the employee of the test results within fourteen calendar days of the insurer or group self-insurer receiving actual notice of the confirmatory test results;
 - (c) The employee was given an opportunity to perform a second test upon the original sample; and
 - (d) The initial or any subsequent testing that forms the basis of the presumption was confirmed by mass spectrometry using generally accepted medical or forensic testing procedures.

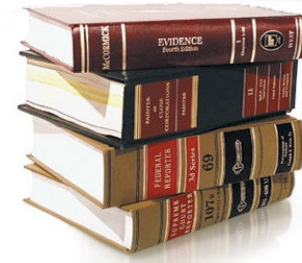


Hertzing v. Beck Motors

1. Court of Appeals case (Pro-employee case for drugs/alcohol penalties.) (Per Curiam decision so no precedential affect)
2. Adds additional requirements not in statute to apply penalty for drug/alcohol violations.
3. Case decided on partial defense but many of the new requirements would apply to forfeiture cases also.



Facts of Case



- Admitted accident. Claimant slipped and fell off bucket.
- Went to ER immediately for treatment.
- Following day gave urine sample.
- Tested positive for cocaine metabolites.
- After waiting about two years the employer elected to take a 50% reduction of benefits.



Commission Decision

- Affirm ALJ (Ruth) that the Claimant was PTD and Employer NOT entitled to a 50% reduction in compensation.
- The employer did not follow their own policy for drug testing.
- Cocaine metabolites found in urine which are not an active ingredient. Statute does not prohibit metabolites.
- Lab test said it was not for legal purposes.
- No chain of custody established.
- CT of APP affirm LIRC.



random/post accident drug test.

- ER and Occupational docs should know about drug testing after every accident
- Employer must ask for the drug test to be completed.
- Request highest level of testing

Best Practices on Drug and Alcohol Defenses

- Testing lab should keep samples of specimen through discovery of case.
- Employer/lab should always follow chain of custody for specimen.
- Make sure lab test is done both for quality and quantity.
- Advise claimant in writing as soon as possible of the positive drug test and the plan to take a reduction in benefits.
- Get claimant's story ASAP on if he took the drugs, when he took them, how much he took, witnesses.
- Consult toxicologist if needed in the case.



OSHA Regulations

- **29 C.F.R. 1904.36 Prohibition against Discrimination:** An employer can not discriminate against an employee for reporting a work related injury.
- Comments from the Federal Register:
- The rule prohibits employers from using drug testing as a form of adverse action against employees who report injuries
 - Do not drug test if:
 - Injury very unlikely to have been caused by drug use; or
 - The method of drug test does not identify impairment but only use at some time in the recent past.



OSHA Rules

- Drug testing policies should limit post-incident testing to situations in which:
 - Employee drug use likely to have contributed to accident;
 - Drug test can accurately identify impairment
 - Not reasonable to drug test an employee who reports:
 - Bee sting
 - Repetitive trauma
 - Injury caused by lack of machine guarding/machine malfunction
 - **How do we utilize drug testing for partial defense cases where it is obvious that the use of drugs did not cause an impairment and was not the proximate cause of the accident?**
 - **Wouldn't drug testing in this situation violate the non-discrimination policy under OSHA regulations?**



OSHA v. MO Work Comp

- If an employer conducts drug testing to comply with the requirements of a state or federal law or regulation, the employer's motive would not be retaliatory and the rule would not prohibit such testing.
- Section 4(b)(4) of the Act prohibits OSHA from ***superseding or affecting workers' compensation laws.*** 29 U.S.C. 653(b)(4)



Safety Violation Penalties

- **Partial Defenses**
 - Safety Violation
 - Fail to follow safety policy (ex. three point contact, lock out-tag out, etc.)
 - Fail to use safety device (harness, glasses, guards)
 - 25%-50% reduction of compensation (medical, TTD, PPD)(*Thompson*)
 - Safety violation must be cause of the injury(*Carver*)



OSHA v. Safety Policies

- OSHA policy against discrimination of employees reporting work injuries is not limited to drug testing, but also, safety policies.
- Is it discriminatory to :
 - Reduce/threaten to reduce WC benefits for violation of a safety policy/failure to use safety devices provided by the employer?
 - Employer to have incentive programs rewarding safety results? (bonus for specific number of accident free days, excluding employees with OSHA recordable accident from drawings for prizes)
 - **Programs must be structured to encourage safety without discouraging reporting of injuries.**



Safety Violations

- ALJ will look at severity of violation and frequency of violation to determine percentage of compensation reduction
- ALJ will also look at title in company. Safety manager may have higher penalty if he/she violates safety rule
- Is it possible to have two safety violations and thus two safety penalties in one accident?
- Is it possible to have a drug and alcohol violation and a safety violation in the same accident?



Conflicts

Can you take reductions of medical benefits if you have a valid safety/drug defense?

287.140 requires the employer to pay all medical to cure and relieve the C from the affects of his injury. Conflict?

Can the employer take the reductions on medical, TTD and PPD before the ALJ writes an award?

287.160 allows for interest at 10% per annum if the benefits are paid more than 30 days late. What if you take a reduction and 3 years after the accident the ALJ rules against you. Do you owe benefits and interest?



Questions??

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